

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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In the Matter of	)	
	)	
Western Wireless Corporation	)	CC Docket No. 96-45
Petition for Preemption of	)	
an Order of the South Dakota	)	DA 99-1356
Public Utilities Commission	)	

**COMMENTS OF THE PERSONAL  
 COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") 1/  
 hereby comments on Western Wireless Corporation's ("Western Wireless") Petition  
 for Preemption 2/ of the South Dakota Public Utilities Commission's ("SDPUC")  
 order 3/ denying Western Wireless' request to be designated as an eligible

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1/ PCIA is an international trade association representing the interests of both commercial and private users and businesses involved in all facets of the personal communications industry. PCIA's Federation of Councils include: the Paging and Messaging Alliance, the PCS Alliance, the Wireless Broadband Alliance, the Mobile Wireless Communications Alliance, the Site Owners and Managers Association, and the Private System Users Alliance.

2/ *Western Wireless Corporation Petitions for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, DA 99-1356 (released July 19, 1999).

3/ *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146 (released May 19, 1999) ("SDPUC Order").

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telecommunications carrier ("ETC") in South Dakota under Section 214(e) of the Communications Act of 1934, as amended ("Act"). <sup>4/</sup>

The FCC should grant Western Wireless' Petition for Preemption. Granting the Petition will ensure that all common carriers, including commercial mobile radio service ("CMRS") providers, enjoy equal opportunities to participate in the FCC's new universal service program. The Commission's recent reaffirmation of the right of wireless carriers to seek ETC status will facilitate a fully competitive system of explicit universal service subsidies. <sup>5/</sup> This advance, however, will come to naught if state commissions, such as the SDPUC, are free to impose unduly onerous ETC designation criteria that undermine the competitive principles underlying the universal service provisions of the Act.

**I. THE FCC SHOULD TAKE ACTION TO ENSURE THAT WIRELESS CARRIERS CAN OBTAIN ETC DESIGNATION EXPEDITIOUSLY**

Western Wireless' inability to receive ETC designation in South Dakota, and its ensuing Petition for Preemption, demonstrate the need for FCC intervention to prevent states from delaying or denying CMRS carrier participation

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<sup>4/</sup> 47 U.S.C. § 214(e).

<sup>5/</sup> See *Federal-State Joint Board on Universal Service, Access Charge Reform*, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262, and Further Notice of Proposed Rulemaking, FCC 99-119, Comments of PCIA at 2 (released May 28, 1999) ( *citing* same at ¶ 72) ("*Seventh Report and Order*").

in the federal universal service program. The FCC has recognized that wireless carriers can provide universal service as efficiently as CLECs and ILECs, and in some cases, at a lower cost than wireline carriers. 6/ The benefits of a wireless competitive alternative should not be denied or delayed for consumers in rural and high-cost areas due to onerous state impediments to ETC designation. The only way for rural and high-cost consumers to realize these competitive benefits, though, is for the FCC to enable all carriers meeting the Section 214(e)(1) criteria, including CMRS providers, to be easily and expeditiously designated as ETCs.

Indeed, it has long been settled that wireless carriers may -- and indeed must -- receive ETC designation where they satisfy the applicable criteria. 7/ This must mean that CMRS providers and other new entrants to the universal service market can be designated as ETCs as readily and as quickly as are ILECs

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6/ See *Extending Wireless Telecommunications Services To Tribal Lands*, WT Docket No. 99-266, FCC 99-205, ¶¶ 8-11 (released Aug. 18, 1999); *Federal-State Joint Board on Universal Service*, Forward-Looking Mechanism for High-Cost Support for Non-Rural ILECs, CC Docket Nos. 96-45, 97-160, FCC 99-120, ¶ 11 & n.33 (released May 28, 1999).

7/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8858 ¶ 145 (1997) ("any telecommunications carrier using any technology, *including wireless technology*, is eligible to receive universal service support if it meets the criteria under Section 214(e)(1)") (emphasis added) ("*Universal Service First Report and Order*"); *Universal Service Seventh Report and Order* at ¶ 15 ("all carriers that provide the supported services, regardless of the technology used, are eligible for designation as an [ETC]").

and CLECs. The FCC has a duty to dismantle unduly burdensome state ETC requirements, such as those discussed below, that stand as barriers to new entrant participation in the federal universal service program.

## **II. THE COMMISSION MUST PREEMPT THE ONEROUS OBSTACLES SOUTH DAKOTA HAS ERECTED TO CMRS PARTICIPATION IN THE FEDERAL UNIVERSAL SERVICE PROGRAM**

The FCC must preempt the unlawful ETC requirements the SDPUC has imposed on Western Wireless, as they effectively preclude all CMRS providers from becoming ETCs in South Dakota. When faced with such significant barriers to competitive entry, the Commission is *required* to preempt under Section 253 and other provisions of the Act. 8/

### **A. The Commission Must Preempt the *SDPUC Order* Under Section 253**

Western Wireless' Petition for Preemption satisfies Section 253's preemption criteria because the *SDPUC Order* has the effect of prohibiting Western

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8/ 47 U.S.C. § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), *the Commission shall preempt . . . to the extent necessary to correct such violation or inconsistency.*"). See also *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986) (FCC preemption appropriate where state action would "thwart" or "impede" federal policies); see also, e.g., *State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421 (10th Cir. 1986); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

Wireless from providing universal service under Section 253(a), and because the *SDPUC Order* does not fall within the “safe harbor” of Section 253(b) (*i.e.*, it is not competitively neutral, nor is it necessary to preserve and advance universal service consistent with Section 254). In particular, the SDPUC’s interpretation of the timing of ETC designation for new entrants is a barrier to entry. It is illogical and erroneous to require that a wireless carrier -- or any other new entrant -- provide a ubiquitous universal service offering *before* it can receive ETC designation. As Western Wireless aptly demonstrates in the Petition for Preemption, 9/ no new entrant can hope, before receiving ETC designation and thereby becoming eligible for federal funding, to compete with ILECs in high-cost and/or rural markets, as the *SDPUC Order* would require.

Likewise, the SDPUC’s denial of ETC status to Western Wireless due to “gaps” in Western Wireless’ wireless coverage area unlawfully discriminates against CMRS providers and is in no way competitively neutral. No ILEC has facilities that cover 100% of its service area -- it is undisputed that wireline carriers must sometimes extend their lines to serve new customers. To PCIA’s knowledge, however, no wireline carrier has ever been denied ETC status due to that practicality. The same should hold true for CMRS providers seeking ETC

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9/ Western Wireless Petition for Preemption at 11-16.

designation. To the extent customers desiring universal service reside in portions of a wireless carrier's designated ETC service area where the carrier's coverage must be improved to serve those customers, the wireless carrier would have the same obligation -- and the same ability -- as wireline carriers to extend service to all consumers who request it.

Finally, the "timing" and "coverage" requirements imposed by the SDPUC are neither consistent with Section 254, which (as the Commission has held) clearly contemplates entry by all telecommunications service providers, including wireless carriers, 10/ nor necessary for the advancement of universal service. Indeed, by excluding a potentially more efficient class of carriers from competing to serve universal service consumers in high-cost areas, the SDPUC's requirement actually *impedes* universal service. As such, South Dakota's onerous approach to ETC designation, which seriously disadvantages CMRS providers, is inconsistent with the pro-competitive, technologically neutral principles underlying Sections 214(e) and 254 of the Act, and must be preempted.

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10/ See *supra* notes 5 & 6.

**B. The FCC Should Preempt the SDPUC's Inquiry into the Pricing of CMRS ETC Offerings As Violating Section 332(c)(3) of the Act**

Another aspect of the SDPUC decision that the FCC should expeditiously preempt is the inquiry into the pricing of Western Wireless' proposed universal service offering. The Commission has already made it clear that the Section 214(e) ETC designation process does not affect Section 332(c)(3)'s prohibition of state rate regulation of CMRS carriers -- and that CMRS carriers do not, by seeking ETC designation, somehow forfeit their exemption from state rate regulation. <sup>11/</sup> An inquiry by a state commission, such as that engaged in by the SDPUC, into a wireless ETC applicant's pricing of its proposed universal service offerings flies in the face of both the pro-competitive intent of the 1996 Act, and the deregulatory intent of the 1993 Omnibus Budget Reconciliation Act, which enacted Section 332(c)(3).

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<sup>11/</sup> *Universal Service Seventh Report and Order* at ¶ 72 ("We re-emphasize that the limitation on a state's ability to regulate rates and entry by wireless service carriers under [47 U.S.C. § 332(c)(3)] does not allow the states to deny wireless carriers ETC status.") (citing *Universal Service First Report and Order*, 12 FCC Rcd at 8858-59, ¶ 145 ("[t]he treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status.")).

**C. The Fifth Circuit's Recent Universal Service Decision Supports FCC Preemption of the SDPUC Order Under Section 214(e)(2)**

The preemption sought by Western Wireless is fully consistent with the Fifth Circuit's recent decision in *Texas Office of Public Utility Counsel v. FCC*. <sup>12/</sup> The court there indicated that any state-imposed ETC criteria that are so "onerous" as to prevent the designation of any additional otherwise qualified ETC applicants probably would be unlawful. <sup>13/</sup> As set forth above, the SDPUC's interpretation of the timing of ETC designation for new entrants, its coverage requirements, and its insistence on regulating the price structure of South Dakota ETCs, each would prevent the designation of otherwise qualified CMRS and other new entrant ETC applicants. Thus, the SDPUC's order directly violates Section 214(e)(2), which, as interpreted by the Fifth Circuit, requires state commissions to designate additional carriers as ETCs. As such, exercise of the FCC's Section 253 and/or general preemption powers to correct the SDPUC's misapplication of Section 214(e) is consistent with the Fifth Circuit's universal service decision.

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<sup>12/</sup> \_\_\_ F.3d \_\_\_, 1999 WL 556461 (5th Cir. July 30, 1999) ("*Texas OPUC v. FCC*").

<sup>13/</sup> *Id.* at \*41 n.31 ("To be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate more than one carrier.'").

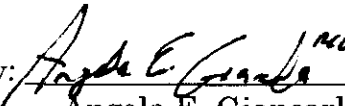


### III. CONCLUSION

For the reasons stated above, PCIA hereby respectfully asks the Commission to expeditiously preempt the *SDPUC Order*.

Respectfully submitted,

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